
CANADA / JUDGMENT

Fleming v. McAllister

2017 BCSC 521

COURT

Supreme Court of British Columbia

DECIDED

30 March 2017

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2017 BCSC 521 Fleming v. McAllister

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fleming v. McAllister,

2017 BCSC 521

Date: 20170330

Docket: M103761

Registry: Kelowna

Between:

Terrance Allen Fleming

Plaintiff

And

Rory Patrick McAllister, Patrick Terrence McAllister,

Danielle Lee Wentland, Minister of Justice

Defendants

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

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Minister of Justice

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Place and Date of Trial:

Kelowna, B.C.

December 5 - 8, 12, 13, 2016

Place and Date of Judgment:

Kelowna, B.C.

March 30, 2017

Introduction

- [1] The plaintiff seeks an assessment and apportionment of damages for injuries suffered in three separate motor vehicle incidents. Liability is admitted in all three incidents.

Background

- [2] The first and second incidents are referenced in one notice of civil claim, the third in a separate notice of civil claim. There was an order dated August 16, 2016, that the two claims be heard together. The plaintiff has settled his claim with the defendant, the Minister of Justice, in respect of the second incident. The terms of that settlement are not known to this Court. The defendants in the first and third incidents have common representation.

The Plaintiff

- [3] The plaintiff is 60 years of age, born May 1, 1956.
- [4] He is divorced after a marriage of approximately 32 years and has two successful adult children. He separated from his ex-spouse Arlene Fleming in May 2009, and they were divorced in 2011.
- [5] He has a grade 12 education (1974) and a diploma/degree in forestry from Selkirk College (1976).

- [6] His work history has, however, been in the construction industry. Since 1986, he has been an owner of a roofing and siding business currently operating as Best-Way Siding (Kelowna) Ltd. ("BWS"). The plaintiff and Arlene Fleming have always been and continue to be the only and equal shareholders in BWS. Both have been and remain active in the business despite their divorce.
- [7] The business sells roofing and siding materials, with roofing materials accounting for the bulk of sales. The company has traditionally focussed on the sale of higher-end and new or innovative products. This has been a deliberate strategy of the business to distinguish itself from large retailers and because of the prospect of larger profit margins on such products.
- [8] There has always been and continues to be a loose and informal distribution of responsibilities between the plaintiff and Arlene Fleming. The plaintiff focuses on sales and marketing. In that respect, he endeavors to work closely with his contractor customers. One of his goals is to educate them about the benefits of the products BWS sells, so they can in turn market those products to their clients. He also assists those contractors with preparing quotes and estimating jobs. His business strategy is to try to help his contractors succeed so they can in turn contribute to the success of BWS.
- [9] The business includes general retail sales of products out of its business premises.
- [10] Arlene Fleming likens herself to an office manager. As part of her assumed responsibilities she assists the business' bookkeeper, looks after in-store retail sales from walk-in customers, and deals with billing and accounts receivable.
- [11] The plaintiff and Arlene Fleming have historically drawn equal salaries from the company. In the years leading up to the motor vehicle incidents, that salary was approximately \$70,000 annually.
- [12] Prior to the first motor vehicle incident on December 17, 2012, the plaintiff enjoyed good general health, although he had undergone bilateral hip replacements (to his left hip in January 2009 and to his right hip in 2011). The second hip replacement was complicated by the development of a deep vein thrombosis. The procedures were, however, generally successful, leaving the plaintiff with only some minor left hip symptoms that were not limiting his overall function. He was active in coaching baseball, achieving some significant recognition for that. He also attended the gym regularly.

The First Motor Vehicle Incident / MVI1

- [13] The first motor vehicle incident ("MVI1") occurred when the plaintiff stopped at a red light at a Kelowna intersection. The defendant failed to stop and struck the vehicle immediately behind the plaintiff. That vehicle was in turn pushed into the rear of the plaintiff's Ford F150 pickup, causing minor damage.

- [14] The evidence from the plaintiff and that of the medical experts as to what injuries were caused by each incident and how each incident affected existing injuries will be referred to in greater detail later in this decision. I will only provide a cursory overview of the injuries in this section, for context.
- [15] The plaintiff described feeling an immediate but momentary sharp pain in his neck. Emergency personnel attended and the plaintiff declined going to the hospital. He ultimately left the scene and carried on with his work. As the day progressed, he developed a headache, and pain in his neck and back.
- [16] His principal lasting complaint from MVI1 is of low back pain.
- [17] The injuries limited the plaintiff's ability to work, but he was gradually increasing his work hours leading up to the time of the second motor vehicle incident. He was able to do some of his work remotely from his home and he had flexibility to come and go from work as needed, but he struggled to attend to all of the tasks that he normally did efficiently and effectively. He was not fully recovered by the time of the second motor vehicle incident.
- [18] As stated, liability for the first motor vehicle incident has been admitted by the defendant.

The Second Motor Vehicle Incident / MVI2

- [19] The second motor vehicle incident ("MVI2") occurred on September 12, 2013. The plaintiff was again in his F150 pickup. The defendant was a police officer travelling in the same direction as the plaintiff. The defendant made a U-turn in front of the plaintiff and the plaintiff hit the defendant's vehicle broadside, roughly in the area of its rear axle. The plaintiff had been travelling at a speed of approximately 50 km/hr immediately before that incident.
- [20] Immediately after the incident, the plaintiff experienced increased pain in his low back, as well as pain in his hips and waist. He also developed pain in his shoulder in the area where his seatbelt had been positioned. Following MVI2 he again reduced his work hours and responsibilities. His symptoms persisted and various treatment modalities were undertaken. He was, as before, able to increase his work load over time. After an initial spike in his symptoms following MVI2 the principal lasting complaint continued to be his low back symptoms.
- [21] The plaintiff's claim in respect of MVI2 was settled prior to the commencement of this trial.

The Third Motor Vehicle Incident / MVI3

- [22] The third motor vehicle incident ("MVI3") occurred on September 16, 2015, while the plaintiff was riding his bicycle. The unidentified defendant pulled out in front of the plaintiff. The plaintiff took evasive action and avoided an actual collision, but fell to the ground while doing so. He injured his left knee.

The Medical Evidence

[23] Each party introduced expert medical opinion evidence. The plaintiff relies on reports of a physical and rehabilitative medicine specialist, Dr. Laidlow, dated November 24, 2014 and June 28, 2016. The defendants rely on the report of an orthopedic surgeon, Dr. Pisesky, dated May 27, 2015. That report predates MVI3.

BWS Finances

[24] The financial success of BWS had declined significantly in the years leading up to the motor vehicle incidents, and that general pattern continued after MVI1. The financial reports of BWS have been reviewed by experts for both parties, who provided opinions on losses in the plaintiff's income attributable to his injuries.

[25] Net earnings and net earnings as a percentage of revenue since 2004, according to the company's statement of earnings and retained earnings, are as follows:

Year

Net Earnings

(loss)

Net earnings as a % of Revenue (loss)

Date of Motor

Vehicle Incident

2004

\$ 97,399

4.4

2005

231,589

5.6

2006

242,144

5.9

2007

233,698

5

2008

325,614

6.5

2009

108,561

2

2010

(292,866)

(5.7)

2011

(304,264)

(9.3)

2012

(175,843)

(6.6)

December 17, 2012

2013

(503,662)

(25.2)

September 12, 2013

2014

(400,029)

(26)

2015

(523,784)

(42.5)

September 16, 2015

Issues and Positions of the Parties

Issues

- [26] There are three broad issues raised by the parties that are at the root of these proceedings:
- a) First, what are the nature and severity of injuries and symptoms resulting from the global effect of the three motor vehicle incidents?
 - b) Second, what has the impact of the plaintiff's injuries been on his work and how has that affected the success of BWS?
 - c) Third, how are the various injuries and the resulting symptoms connected generally, and, more specifically, how are they connected to each of the motor vehicle incidents?
- [27] The answers to the three broad questions set out above will provide the foundation for the conclusions regarding each of the specific issues and claims.

The Plaintiff's Position on Liability

- [28] The plaintiff says that he is entitled to an award of nonpecuniary damages, past and prospective loss of income, and loss of housekeeping capacity. He does not advance any claim for costs of future care. In addition, the parties have reached an agreement for special damages to be paid by the defendants in this trial. The plaintiff seeks a global assessment of damages but with an apportionment of a percentage of that assessment to each of the three motor vehicle incidents. He argues that the apportionment should be 80%, 10%, and 10%, respectively, to each of the first, second, and third motor vehicle incidents. In light of his settlement in respect of MVI2, the plaintiff argues that his global award here should be reduced by 10%.
- [29] The plaintiff says his health was good before MVI1 and that he was active in and a key figure of BWS. Specifically, he says he was the driving force behind the business' marketing and sales in addition to providing physical labour.
- [30] He says he had a long and successful history as a pitching coach, including in 2011 and 2012, and went to the gym four to five days per week. He was in a healthy romantic relationship prior to MVI1.
- [31] He says MVI1 left him with chronic and serious low back pain and spasm as well as some reduced range of motion in his neck. Despite a substantial amount of physiotherapy, the injuries significantly affected his effectiveness and engagement in his work. He also says that he was not able to carry on with many of his personal activities with the same enthusiasm and vigour. All of this, he says, contributed to the failure of two personal relationships.
- [32] The plaintiff says MVI2 caused some new pain in his hips and shoulder, but generally this incident was not a significant factor in his ongoing symptomatology.

- [33] The plaintiff argues that MVI3 resulted in a brief aggravation of his low back pain and neck issues and caused a new knee injury.

The Defendants' Position on Liability

- [34] The defendants do not challenge that the plaintiff was injured or generally what the nature of his injuries was in each of the incidents. The defendants say, however, that MVI2 contributed significantly to the plaintiff's injuries. The defendants point to the nature of the incidents and the damage to the plaintiff's pickup as support for the proposition that MVI2 involved much greater impact and forces. In addition, the defendants argue that the plaintiff's treatment history also points to a more substantial contribution by MVI2.
- [35] The defendants say the plaintiff suffered mild soft tissue injuries to his neck and back in MVI1 and that those were aggravated in MVI2. The defendants argue that these injuries are indivisible. The defendants say that the knee injury from MVI3 is divisible and can be assessed separately. The defendants point to medical evidence suggesting that the knee injury consisted of a cartilage injury or an aggravation of an underlying degenerative change within the knee.
- [36] The defendants argue that because the injuries from MVI1 and MVI2 are indivisible, the plaintiff should only be able to recover the damage award assessed for those two incidents less the settlement amount that the plaintiff negotiated in respect of MVI2.
- [37] Alternatively, the defendants say that the apportionment of damages should be 45% to each of MVI1 and MVI2 and 10% to MVI3.

The Plaintiff's Position on Damages

- [38] In addressing the assessment of damages, the plaintiff says that the symptoms should be viewed as moderate to severe and chronic in nature. He argues that an appropriate award for nonpecuniary damages is \$115,000.
- [39] The plaintiff also argues that he has suffered significant past loss of capacity to earn income. While acknowledging that market and economic factors independent of the motor vehicle incidents have impacted BWS, he says his past loss of earnings as a result of the incidents is \$600,000. The plaintiff characterizes this as a loss of capacity to earn income. He asserts that BWS' business losses were increased as a result of his injuries. He says that with his continued symptoms, a future loss of a further \$300,000 should be assessed. The plaintiff relies on the expert report of the business valuator Mr. Spence in support of this position.
- [40] The plaintiff also argues that he should be awarded \$20,000 for loss of housekeeping capacity based on his physical limitations.

The Defendants' Position on Damages

- [41] The defendants say that the lasting effects of the injuries are limited. They point to the evidence that the plaintiff continues to be physically active. The defendants argue that an overall assessment of nonpecuniary damages should be \$45,000 - \$70,000.
- [42] In respect of the plaintiff's claims for loss of earning capacity, the defendants say that there are many unrelated factors affecting the performance of BWS. The defendants say that when those are taken into account, an appropriate award for past losses would be \$18,000 and that there is no established future loss of capacity.
- [43] In addition, the defendants say that there should only be a "modest" award, if any, for loss of housekeeping capacity.
- [44] The parties reached an agreement with respect to special damages. That agreement is that an award of \$4,000 should be made with no apportionment as between the incidents.

Analysis

- [45] In order to assess the effect of the injuries arising from the motor vehicle incidents, it is necessary to make findings as to the plaintiff's pre- motor vehicle incident health.

The Plaintiff's Pre-Incident Health

- [46] Both medical experts agreed that prior to the motor vehicle incidents the plaintiff was not experiencing any significant related problems and had no real health-related limitations. He did have some left hip pain, but there is no evidence it was impacting his activities or employment.
- [47] Post-motor vehicle incident investigations revealed a pre-motor vehicle incident degenerative condition in his lumbar spine that was, in fact, asymptomatic. Dr. Pisesky for the defence stated the plaintiff's " past history surgically and medically were essentially non-contributory." The plaintiff's expert Dr. Laidlow indicated in his June 28, 2016 report:

In my previous report, I indicated that there was evidence that he had appeared prior history of lower back pain and a history of some pain in the anterior aspect of the right hip, as well as altered sensation over the lateral aspect of the right thigh.

- [48] This comment and the one referenced in it from the previous report regarding a history of low back pain are based on Dr. Laidlow's interpretation of a 2011 physiotherapy pain diagram that was in error. The physiotherapist, Mr. Walsh, testified and confirmed that the markings Dr. Laidlow took to be locations of pre-existing pain were in fact indicating areas without pre-existing pain. As a result, and despite the references in Dr. Laidlow's reports to pre-existing low back pain, it is my conclusion that there was none of any relevance to this decision. There is no indication that this misinterpretation of the physiotherapy record from 2011 had any undue impact on Dr. Laidlow's opinions such that I should give them any

reduced weight.

- [49] As noted, the plaintiff had both hips replaced prior to MVI1 but there is no indication of significant lasting limitations from those surgeries. The reference in Dr. Laidlow's report to pain in the anterior aspect of the right hip and an altered sensation over the lateral aspect of the right thigh are, as I understand the evidence, the only consequences of those surgeries and they are of no functional consequence. The plaintiff was active with BWS full-time and was also active outside of work with coaching baseball and attending the gym. He was generally unrestricted in carrying on the activities he wished to pursue.

The Plaintiff's Post-Incident Health

Treatments

- [50] The plaintiff has undergone a variety of treatments and assessments since MVI1.
- [51] He has attended a substantial amount of physiotherapy.
- [52] The plaintiff was prescribed Gabapentin, a neuropathy pain medication, in 2013. During the period of time he was using that medication, he experienced significant weight gain and became very deconditioned. Once off the Gabapentin, he was able to lose weight, and by July 2015 had lost approximately 48 pounds.
- [53] The plaintiff underwent Xylocaine injections (an anaesthetic or nerve block) in July and September 2014, to try to identify the specific source of pain in his back and to determine if he was a candidate for rhizotomy. Those procedures did not produce any lasting relief and it was determined that a rhizotomy was not a treatment option for him.
- [54] In March 2015, the plaintiff was given epidural steroid injections which provided approximately two months' relief.
- [55] There are no specific treatment recommendations at present except that the plaintiff maintain his own exercise program and take low-level analgesics as required.

Low Back

- [56] The medical opinions are not dramatically different especially in relation to the low back injury.
- [57] Dr. Laidlow says the plaintiff had a "long-standing degenerative disc disease of the lumbar spine with facet joint osteoarthritis prior to the accident". Dr. Laidlow opines that "it did not seem as though the second accident made any change to it" and, "I feel that [MVI1] did result in a musculoligamentous injury to the lumbar spine and that this resulted in further myofascial tightness and a worsening of his mechanical lower back pain over what had been previously present." I note that the reference to "worsening" is based on the aforementioned erroneous interpretation of pre-MVI1 physiotherapy records.
- [58] Dr. Pisesky says in respect of the plaintiff's low back:

It is my opinion there were no pre-existing problems contributing to the ongoing symptomatology and that the injuries sustained in the motor vehicle accident of December 12 [sic], 2012 [MVI1] are, in my opinion, the sole cause of his ongoing symptomatology that he is experiencing.

Mid Back

[59] In respect of the plaintiff's complaints of mid back pain, Dr. Laidlow, in his 2014 report, says:

I feel that Terry did likely suffer the injury to the left T8 and T10 ribs, in a form, from an undisplaced fracture with one of the accidents, but it is impossible to know which one it was. I attribute the mid back pain equally to the motor vehicle accidents of December 17, 2012 [MVI1] and September 12, 2013 [MVI2].

[60] In his 2016 report, he said:

I am of the opinion that he had a muscular strain to the thoracic spine with both accidents and was still having some mechanical pain related to it. At the moment, he feels that his symptoms have remained the same. I do not find any restriction the movement of the mid back or tenderness to palpation.

[61] Dr. Pisesky made no reference to complaints of mid back pain and observed no mid back pain issues on examination.

Neck

[62] Dr. Laidlow noted in 2014:

I feel that Terry did suffer a mild musculoligamentous strain to the neck with both [of the first two] motor vehicle accidents and some mild mechanical neck pain since that time, which seems to be resolving. I attribute the neck pain to both motor vehicle accidents.

[63] In 2016, Dr. Laidlow said of the plaintiff's neck, "[o]n my examination of his neck now, he had full movement and no evidence of tenderness. I feel that the strain has resolved."

[64] Again, Dr. Pisesky noted no neck issues on examination and made no comment on any neck issues in his report.

Shoulder

[65] Dr. Laidlow addressed the complaints of shoulder pain in 2014, saying:

He did demonstrate muscular tightness in the posterior shoulder girdle.

I feel that Terry suffered a muscular strain to the anterior chest with the second motor vehicle accident as a result of a seatbelt injury. He does get rare myofascial pain related to this that seems to be resolving. I attribute it to the second motor vehicle accident.

[66] In 2016, Dr. Laidlow said:

It was my previous opinion that he had suffered a muscular strain to the anterior chest with the second motor vehicle accident as a result of the seatbelt injury. At this time, I do not find any evidence of abnormality in the shoulder and I feel that this injury has resolved.

[67] Again Dr. Pisesky noted no issues with the plaintiff's shoulder on examination and made no comment on any shoulder issues in his diagnosis.

Thighs

[68] Both Dr. Laidlow and Dr. Pisesky concluded that changes in sensation over the thighs were unrelated to any of the motor vehicle incidents.

Summary

[69] In Dr. Laidlow's summary in his most recent report (2016), he said this:

I think it is likely that Terrance will continue to have symptoms as he is now. I do not feel that he has any treatment options that would make a difference beyond general conditioning and the exercises suggested. He is not a candidate for rhizotomy based on lack of success of the injections. He has improved with respect to his neck, mid back and shoulder and they are unlikely to bother him in the future. The altered sensation over the lateral aspect of the right thigh will be permanent but will not result in any weakness or extension of numbness to other areas. The left thigh numbness has settled and will not come back.

The left knee pain still needs further evaluation to determine whether Terrance is a candidate for arthroscopy and if so, has a good result from it. I do feel that he is at greater risk of developing osteoarthritis in the left knee due to the September 2015 [MVI3] injury but the full evaluation of the risk would need the additional evaluation suggested.

[70] Dr. Pisesky says:

His current status is in my opinion, quite good and my prognosis over time is that he should have a gradual improvement overall in the symptomatology.

The treatments that he should probably continue are that of ongoing physiotherapy and daily exercise. Physiotherapy may have to be continued for a further three to six months, once to twice a week. He may actually have to have a further epidural block if he deteriorates overall in his neurological status.

It is my opinion that as a result of these injuries, there is a low probability that this will advance to the point of needing surgical management in the future.

It is my opinion that in the long term he should not have permanent symptomatology overall except for some mild aching in his low back as well as the numbness in his right thigh from the Meralgia Paresthetica.

It is my opinion, in terms of his employment likely to continue to be restricted in terms of heavy physical work of lifting and climbing resulting from his job as a sider. He may have to continue indefinitely or permanently as an administrator in his job.

It is my opinion that the claimant's medical problems and physical problems prior to the accident have not been impacted in any way and are not contributing to his ongoing symptomatology in any way at this time.

[71] The plaintiff describes his post-injury symptoms as also having had a significant impact on his personal life and employment. It is noteworthy that in his testimony the plaintiff frequently referred to his mental state, that he simply was not motivated, that he was easily frustrated. He tearfully referred to his two failed relationships that had begun after the divorce from his wife. The only related comments in the medical opinions are as follows:

a) In Dr. Pisesky's 2015 report:

It is my opinion there may be some psychological issues behind all this as commented on by Dr. Nowak in his report of September 4, 2013, and by Mr. Fleming's response in my office. This is not my area of expertise and I will not further comment on this. It may be worthwhile looking into this however;

b) In Dr. Laidlow's 2014 report:

On September 4, 2013, Dr. Nowak, a Specialist in Physical Medicine and Rehabilitation, reviewed Terry. He indicated that Terry was having pain in the neck, lower mid back and lumbar region. Dr. Nowak indicated that the previous hip surgery had been complicated by bilateral deep venous thrombosis. Dr. Nowak felt that there may be a fair amount of somatization, anxiety and symptom magnification behavior.

[72] No report of Dr. Nowak is in evidence and the issue is not addressed anywhere else in the evidence or submissions. While I accept that dealing with longstanding pain is frustrating and can affect a person's mood and efficiency, it is very difficult on the evidence before me to identify the extent to which these complaints might be attributable to the plaintiff's physical injuries.

[73] The notice of civil claim relating to MVI1 and MVI2 refers to "trauma induced anxiety" and "sleep disturbance and fatigue". The notice of civil claim for MVI3 includes in its list of alleged injuries "sleep disturbance and disruption", and "exacerbation of depression and anxiety". There is no evidentiary basis to find any trauma-based anxiety and it was not argued. In addition there is no evidence that MVI3 exacerbated any depression or anxiety.

[74] In the days following MVI1, pain in his low back was the plaintiff's most significant problem and he says that it has remained so ever since. He started physiotherapy in January 2013, and attended two to three times per week for treatment, and another two times per week for traction. He experienced what he described as spasms in his low back.

- [75] The plaintiff was in a relationship and living with his girlfriend. They were engaged in March 2014, but that relationship ended in April 2015. The plaintiff blames the symptoms and the medications for changes in himself that prompted his fiancée to end that relationship. His fiancée did not testify.
- [76] He testified that he was unable to coach baseball in 2014, and that he struggled with home cleaning and maintenance. He did return to cycling in 2014, an activity that he had pursued in the past, and found that that did not aggravate his symptoms and was helpful in his conditioning, including weight loss.
- [77] Unfortunately his return to cycling led to MVI3, but since that incident the plaintiff has once again returned to cycling. He also regularly goes to the gym. He works four to five hours per day, five days per week. He has been in another relationship that ended in October 2016, after approximately one year.
- [78] The combined effect of the injuries limited the plaintiff's time at work and his activities while at work. He had the freedom to come and go from work and his hours of work and his absences were not tracked or recorded. In addition to his physical absence and reduced abilities, he found as time wore on without sustained or meaningful improvement, his optimism and enthusiasm for his work suffered. He described himself as becoming short tempered. It is in respect of this evidence from the plaintiff that some challenges arise. While the plaintiff clearly blames the motor vehicle incidents for his emotional state, the evidence as a whole is lacking in making that connection.
- [79] The plaintiff said that there was some improvement in his condition before MVI2 and that that incident set him back for a brief period.
- [80] There are issues in respect of the plaintiff's testimony regarding the impact of MVI2 on his activities. With multiple vehicle incidents and injuries, the developments in his relationships, and the events affecting his business, it was apparent during his evidence that he had difficulties articulating the impact of each event and keeping those clear in his mind. During his cross examination on inconsistencies in his evidence, he observed with considerable frustration that, in hindsight, he should have kept records. Given all that was occurring in the plaintiff's life, it is understandable that he had difficulty giving evidence in a detailed chronology and articulating the impact at various times of various events and circumstances. In the end, however, I was not left with confidence in the reliability of his recall of specific periods of time and the impact of specific events. I conclude that these details had in fact blurred in the plaintiff's memory and that his efforts to bring clarity were influenced, at least subconsciously, by what would improve the results of this trial for him.
- [81] Those challenges are, however, resolved by the consensus of the two medical experts regarding the impact of MVI2. Dr. Pisesky said in his report that MVI2 "did not result in any significant new injuries but primarily did result in an aggravation of his initial injuries from the first accident." Dr. Laidlow opined that MVI2 did not result in any change.

- [82] I rely on those expert opinions generally to understand the impact of each of the motor vehicle incidents on the plaintiff's symptoms and his past and future prognosis. Certainly, the plaintiff's evidence assists in understanding the global impact on him, but it is not helpful in respect of the task of attribution.
- [83] The knee injury resulted in some clicking when the plaintiff is climbing stairs but it is not a significant issue for him.
- [84] Overall, the plaintiff describes his current symptoms as fluctuating with pain at 2 to 4 out of 10 on a daily basis, with spasms in his low back resulting in pain at 8 to 10 out of 10. The latter episodes occur intermittently. He is able to remain physically active, including being able to cycle 50 km routinely during the cycling season and going to the gym five to six days per week. He does this for his own enjoyment and in part because physical activation is necessary to manage his symptoms. This activity does provide some context for understanding the ongoing impact and severity of his condition.

Nonpecuniary Damages

- [85] Each party provided a number of authorities in support of their respective positions and they are not substantially at odds. The plaintiff's authorities suggest a range of \$80,000 - \$90,000 in nonpecuniary damages, and, with the addition of the knee injury, the plaintiff argues \$115,000 is an appropriate award. The defendants' cases suggest a range of \$60,000 - \$70,000. I will not refer to all of the authorities but attach as an appendix to this decision an index of the decisions from each of the parties' books of authorities.
- [86] It is noteworthy the plaintiff makes no mention in his submissions of any psychological injury or condition. The plaintiff's evidence left the impression that he attributed much of his difficulty at work and in his personal relationships to lack of drive and interest; to a change in his personality. There is no expert evidence to explain specifically the nature of his emotional problems or their connection to the motor vehicle incidents. Anecdotally, one might say such responses would logically flow from chronic pain. But, in the circumstances of this case and the evidence before me, that is not sufficient to prove such an injury.
- [87] This is of note since Dr. Laidlow says the plaintiff is only limited by his injuries in the physical aspects of his work. Dr. Laidlow does not specifically refer to any other limitation including any psychological condition. Dr. Pisesky's conclusion referenced above makes no mention of psychological issues.
- [88] In the decision of *Dzumhur v. Davoody*, 2015 BCSC 2316, an award of \$85,000 was made for nonpecuniary damages. There, the Court had medical opinion diagnosing sleep disruption, an emotional illness, and psychological symptoms, and recommending antidepressants. In this case, the plaintiff has been faced with the losses of relationships, as well as serious business losses contributed to by economic, and environmental circumstances, which certainly impact his mental health.

- [89] In *Preston v. Kontzamanis*, 2015 BCSC 2219, Parrett J. awarded \$100,000 for nonpecuniary damages, describing the plaintiff as having his life reduced from a very busy and active individual to a more sedentary observer, noting that his lifestyle, both in his profession and his choice of recreational activities, had been significantly curtailed. While that may be a description that the plaintiff would endorse for himself in this case, it is not one that is supported by the medical reports. That, together with the uncertain connection between his emotional issues and his injuries, causes me to conclude that the plaintiff is not in the same category.
- [90] Having considered all of the evidence and the authorities provided to me, it is my conclusion that an appropriate global award for nonpecuniary damages is \$70,000.

Loss of Earning Capacity

- [91] This is the most contentious aspect of the plaintiff's claim. The dispute between the parties focuses on the question of whether - or, perhaps more accurately, how much - of the poor performance of BWS is a product of the plaintiff's injuries. There is no doubt that industry and economic factors have played a significant role in the company's performance. It is obvious from a review of the earnings and earnings compared to revenue that there has been dramatic decline and that that trend began before MVI1. The decline in earnings as a percentage of revenue did fall steeply in the first full year after MVI1.
- [92] The plaintiff attributes the decline in the fortunes of BWS primarily to his absence from work and his reduced efficiency and engagement while at work as a result of his injuries. While acknowledging economic forces took a toll on BWS, he stresses that this downturn was not the first in the business' long existence. He says the difference in his ability both physically and emotionally to respond to a downturn with the same vigour, enthusiasm and interest as he would otherwise have shown has had a significant negative impact and resulted in a much greater decline than otherwise would have occurred.
- [93] Based on his injuries and my conclusions as to their severity, I have no difficulty accepting that they would have had a negative impact on BWS. In particular, in an economic downturn it makes sense that a small business would rely heavily on its key personnel. Indeed, the defendant's expert readily acknowledged that proposition in cross-examination. The difficulty is, however, determining the amount of that decline attributable to the injuries.
- [94] *Hardychuk v. Johnstone*, 2012 BCSC 1359 [Hardychuk], contains a useful summary of the law regarding the assessment of past loss of earning capacity at paragraphs 175 to 178:
- [175] An award of damages for loss of earning capacity, whether in the past or the future, represents compensation for a pecuniary loss. The goal is to restore the plaintiff to the position he or she would have occupied but for the defendant's negligence. Accordingly, compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the accident-related injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141; *M.B. v. British Columbia*, 2003 SCC 53; *Gregory v. Insurance*

Corporation of British Columbia, 2011 BCCA 144.

[177] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity, however, involves consideration of hypothetical, not actual, events. The plaintiff is not required to prove hypothetical events on a balance of probabilities. Rather, the future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey; Falati v. Smith*, 2010 BCSC 465; *aff'd* 2011 BCCA 45.

[178] As with the loss of future earning capacity, the court's task is to assess damages for past loss of capacity rather than to calculate them mathematically. Allowances for contingencies should be made and the award must be fair and reasonable taking into account all of the circumstances: *Falati*.

[95] The British Columbia Court of Appeal's decision in *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 [Rowe], referenced in *Hardychuk*, considered a claim for loss of earnings where the plaintiff was neither a shareholder nor an "official employee". The Court of Appeal made these comments:

[22] In *D'Amato v. Badger*, [1996] 2 S.C.R. 1071, an appeal from the decision of this Court on which the appellant relies, the company of which Mr. D'Amato was a 50% shareholder appealed from the conclusion that its loss was too remote. The Supreme Court of Canada dismissed the appeal. As a result, the Court said,

52 the issue arose whether the award of \$36,650 by the Court of Appeal under the alter ego principle should stand. The rationale for the alter ego doctrine is not as strong as it once was, in light of recent developments in tort law. However, the respondents did not cross-appeal on this issue, so the Court of Appeal's award of \$35,650 [sic] remains as is.

[23] Clearly, the court called into question the continuing utility of the "alter ego" doctrine, a point that is significant on this appeal. The rationale for the "alter ego" doctrine is that injured plaintiffs who earn their income through a closely-held corporation should not be denied damages for their loss simply because, strictly speaking, the loss of income was suffered by the corporation. This rationale focuses on the loss of income per se as the relevant compensable loss. However, the relevant loss is not the income itself; rather, it is the value of the loss of earning capacity, a capital asset, for which the tortfeasor must pay compensation.

[27] The Chief Justice said,

47 There is considerable case law establishing that an award for loss of earning capacity is intended to compensate for the loss of an asset, the capacity to earn. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at p. 251, Dickson J. (as he then was), following *Jennings v. Cronsberry*, [1966] S.C.R. 532, stated that:

It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, supra. A capital asset has been lost: what was its value?

Subsequent decisions have followed this approach: see *Earnshaw v. Despina* (1990), 45 B.C.L.R. (2d) 380 (C.A.), at p. 399; *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.), at p. 59; *Pallos v. Insurance Corp. of British Columbia*, (1995), 100 B.C.L.R. (2d) 260 (C.A.), at para. 27. As Finch J.A. noted in *Pallos*, these cases "all treat a person's capacity to earn income as a capital asset, whose value may be lost or impaired by injury".

[Emphasis in original]

[28] On the question of the appropriate valuation of the lost asset, the Chief Justice turned to academic commentary:

49 As Cooper-Stephenson notes, supra, [Kenneth D. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996)] at p. 138, damages under this head are universally quantified on the basis of what the plaintiff would have earned, had the injury not occurred.

As far as concerns lost income, the courts fluctuate between the notion of "loss of earnings" and "loss of earning capacity", not for the most part intending any aspect of the substance of an assessment to depend on the particular wording, since damages are universally quantified on the basis of what the plaintiff would have, not what he or she could have, earned absent the injury.

[Emphasis in originals]

[29] She concluded,

50 These damages are not, then, based on a fixed value that has been assigned to an abstract capacity to earn. Rather, the value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that she or he would have received over time, had the tort not been committed. It follows that the loss of this value - the loss that the plaintiff has sustained, and that the damage award is intended to compensate for - should be treated as a loss sustained over time, rather than as a loss incurred entirely at the time that the tort was committed.

[Emphasis of Smith J.A. in Rowe]

[30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim - loss of the value of any work the plaintiff would have done but for the accident but now

will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[Smith J. underscoring; other emphasis in original]

[32] I see no need to enter into the esoteric debate as to whether a claim for past loss of earnings is a claim for general or special damages: see *Trache v. C.N.R.*, [1929] 2 D.L.R. 321 (Sask. C.A.); *Heltman et ux v. Western Canadian Greyhound Lines Ltd.* (1966), 57 W.W.R. 449 (B.C.C.A.); *Baart v. Kumar* (1985), 66 B.C.L.R. 1 (C.A.); *Wersch v. Wersch*, [1945] 2 D.L.R. 572 (Man. C.A.); *Alexander Enterprises Ltd. v. Dobbin* (1987), 63 N.F.L.D. & P.E.I.R. 1 (Nfld. C.A.). The term "special damages" may have different meanings in different contexts and, in most cases, the distinction between general and special damages will not matter. However, the distinction is important in cases, such as this one, where the evidence of pre-trial loss of earning capacity does not come from a conventional income stream. I would adopt the apt remarks of Barwick C.J. in *Arthur Robinson (Grafton) Pty Ltd. v. Carter* (1968), 122 C.L.R. 649 at 658, [1968] H.C.A. 9:

The respondent is not to be compensated for loss of earnings but for loss of earning capacity. However much the valuation of the loss of earning capacity involves the consideration of what moneys could have been produced by the exercise of the respondent's former earning capacity, it is the loss of that capacity, and not the failure to receive wages for the future, which is to be the subject of fair compensation. In so saying, I realize that many statements may be found in the reported cases where loss of earnings has been the description of this element in special damages. But I do not find that in these it was necessary to consider or draw the distinction between the loss of earnings and the loss of earning capacity. But where in Australia attention has been drawn to the distinction, authoritative expressions with which I respectfully agree have indicated that it is loss of earning capacity and not loss of earnings that is to be the subject of compensation. But though this is I think the recognized position in Australia, the wages which would have been earned between the receipt of the injury and the date of trial are somewhat illogically, as I think, calculated and treated as special damages. In my opinion, it would be better that they should not be so treated for amongst other things, such treatment tends to plant in the mind the idea that it is the loss of the earnings which is to be compensated. On the other hand, not to so treat them would help to emphasize that it is the loss of earning capacity which is the subject of the damages. However, in most cases they may have but small practical significance; and in this case, in relative terms, none.

[Emphasis of Smith J.A. in Rowe]

[96] More recently in *Ibbitson v. Cooper*, 2012 BCCA 249, after referencing its earlier decision in *Rowe*, the Court of Appeal said this at para. 19:

[19] While in many cases the actual lost income will be the most reliable measure of the value of the loss of capacity to earn income, this is not necessarily so. A hard and fast rule that actual lost income is the only measure would result in the erosion of the distinction made by this Court in *Rowe*: it is not the actual lost income which is compensable but the lost capacity i.e. the damage to the asset. The measure may vary where the circumstances require; evidence of the value of the loss may take many forms (see *Rowe*). As was held in *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11, 84 B.C.L.R. (3d) 158, the overall fairness and reasonableness of the award must be considered taking into account all the evidence. An award for loss of earning capacity requires the assessment of damages, not calculation according to some mathematical formula.

(See also *Catling v. Poteryko*, 2017 BCSC 311 at paras. 26-32 and *Worobetz v. Fooks*, 2015 BCSC 150 at paras. 105-107.)

[97] The plaintiff relies on the report of Donald Spence, an accountant and business valuator. Key to his report are his "primary assumptions" described as follows:

7. You have asked us to prepare calculations utilizing the following alternative assumptions:

- a) Assumption One. The increase in the Company's wages expense, if any, during the fiscal years following the First MVA was the result of the First MVA, the Second MVA and/or the Third MVA (collectively the 'MVAs'); and,
- b) Assumption Two. Absent the MVAs, the Company would have generated similar pre-tax income (loss) during each of the fiscal years 2013, 2014 and 2015 (i.e., fiscal years ended March 31) as it had on average during the fiscal 2011 and 2012 years (i.e. the two fiscal years prior to the first MVA).

[98] In his conclusion, Mr. Spence identified losses in 2013 to 2015, and nothing in 2016. Relying on the assumptions set out above, losses are calculated as follows:

Year

Applying Assumption One (para. 7 a))

Applying Assumption Two (para. 7 b))

2013

\$ 58,000

\$235,000

2014

61,000

121,000

2015

14,000

137,000

TOTAL:

\$133,000

\$603,000

[99] Each assumption facilitates a relatively straightforward calculation. Applying Assumption One, Mr. Spence simply identified the arm's-length wages as a percentage of revenue for 2011 to 2016. Any percentage increase in the years after the first motor vehicle incident was identified to be the loss.

[100] In applying Assumption Two, Mr. Spence looked at the same five-year period. He roughly averaged the pre-tax loss for 2011 (\$326,000) and 2012 (\$210,000) at \$270,000. He then attributed any loss in years following MVI1 above \$270,000 to be a product of the injuries.

[101] There are numerous issues and problems with these assumptions and Mr. Spence's report. I note that nowhere in the report or in his testimony did Mr. Spence actually express the opinion that the method would produce reliable loss calculations. The plaintiff's counsel suggested that this would be a logical inference and should be implied, but I am unable to accept that proposition. It is my observation that Mr. Spence provided a very simplistic way of trying to identify a loss from the complex circumstances affecting the company's fortunes, and it is not, in my view, a reliable one. His failure to endorse the utility of the assumptions as creating a reliable estimation of loss is conspicuous and of consequence.

[102] It is of note that the two assumptions are presented as alternative methods of identifying a specific loss and yet they produce dramatically different results. Logic would suggest that if they were each reliable methodologies the results would at least be similar. There can in fact be only one actual loss value. The task is to determine what it is. The fact that these efforts provided dramatically different results is an indication that one or both assumptions is/are flawed.

[103] Nowhere does Mr. Spence comment on this discrepancy by indicating that one or the other of the assumptions is a better indicator or, in fact, that either of them are reliable indicators of losses attributable to the plaintiff's injuries. Indeed, as can be seen by his paragraph 7, quoted above, he does not even take ownership of the assumptions. He states only that he was asked to apply them. In the end, his report is primarily made up of some arithmetic based on assumptions put to him.

- [104] Assumption Two uses two very different results from 2011 and 2012 to produce an average. There is no earlier history considered and I am unclear on why an average of two years with very different results would provide a reliable measure or standard against which to measure the results in subsequent years.
- [105] The evidence from the plaintiff and Arlene Fleming, as well as the evidence generally, does provide some indication about staffing decisions given the business environment in which BWS was operating and given the plaintiff's limitations, but it falls short of supporting Assumption Two. There may in fact be a correlation between the plaintiff's injuries and the wages, but there is not an evidentiary basis to say the connection is as direct as the assumption in the report presumes.
- [106] There were many things occurring that may have affected the business, including the economic and industry factors, and the plaintiff's health.
- [107] The assumptions in Mr. Spence's report are, in my view, superficial. To illustrate the difficulties with such a superficial approach to the losses, I refer to the table in paragraph 25 above. Here, however, I have added some additional columns to highlight some significant aspects of the financial statements which are not explained and, in my view, not readily explainable by the plaintiff's injuries.

Year

Net Earnings

Net earnings as a % of gross Revenue

Date of Motor

Vehicle Incident

Bad debt expenses

(000's)

Net revenue as a % gross revenue*

2004

\$ 97,399

4.4

73

27.5

2005

231,589

5.6

55

27.8

2006

242,144

5.9

32

28.1

2007

233,698

5

4

25.5

2008

325,614

6.5

32

27.9

2009

108,561

2

209

27.5

2010

(292,866)

(5.7)

903

36.2

2011

(304,264)

(9.3)

189

26.7

2012

(175,843)

(6.6)

Dec. 17, 2012

9

26.6

2013

(503,662)

(25.2)

Sept. 12, 2013

65

21.7

2014

(400,029)

(26)

92

29.5

2015

(523,784)

(42.5)

Sept. 16, 2015

10

6.0

*Net revenue here is net of direct expenses

- [108] As can be seen, bad debt expenses jumped dramatically in 2009 to 2011, inclusive. The plaintiff was unable to explain this, indicating that he left such accounting issues to his accountants. He did say that BWS changed accountants during this period and different accounting practices may account for some of this, but this is not clear. It may be that performance in prior years was skewed by questionable sales that were causing increases in accounts receivable.
- [109] Further, revenues after deducting direct expenses, which I infer are costs of goods sold, follow a pattern starting in 2013 (the full first year after MVI1) that is difficult to understand unless factors other than the plaintiff's motor vehicle incident injuries were contributing. These percentages are ultimately a reflection of mark-up. The average up to 2011 was 28.4% and including 2012 was 28.2%. The three years that follow are 21.7%, 29.5% and 6% respectively. Based on the plaintiff's recovery and return to more regular and substantial work hours, one would expect the effect of his injuries on the business to be declining generally into 2015. There is certainly no evidence that explains this pattern and, particularly, that demonstrates that the pattern is attributable to the plaintiff's injuries. Obviously the profit margin on sales is the key to the company's success.
- [110] The defendants introduced a report of Mr. Harder. That report did not undertake an independent assessment but rather critiqued the approach of Mr. Spence and then made adjustments to the calculations. For example, Mr. Harder challenged Mr. Spence's determinations that income tax should not be considered and that the whole of the loss would be the plaintiff's as opposed to one half of it because of the 50% shareholding. I will not address those issues here because it is my conclusion that I cannot rely on the fundamental calculations in Mr. Spence's report themselves. In the result, I am unable to rely on either report as a foundation for determining the losses.
- [111] The real loss to BWS would be in the effectiveness and efficiency of the plaintiff. This is a product of his reduced presence and his reduced efficiency due to his ongoing pain and limitations in his work. There is no question on the evidence that his role at BWS involved some physical labour, but, in large measure, his inability to continue that work could be compensated for through other employees.
- [112] In relation to his marketing and communication with contractors and suppliers, he was able to offset the effects of his injuries on this work, to some extent, by doing work from home. It is, however, a very different scenario, especially in challenging market conditions, having a healthy and enthusiastic supplier dealing with contractor clients, versus one who is somewhat detached and less responsive due to physical absence and pain. There is no evidence of specific contracts lost, rather just a general decline in the overall fortunes of the business. Identifying how much of that is specifically attributable to the accidents is impossible. The financial data serves only to provide an outer limit of the total decline and the task for assessment is to identify how much of that should properly be attributed to the

decline in the plaintiff's function.

- [113] In carrying out this task, some of the observations made by Mr. Harder in his report need to be considered. Among them is the fact that the plaintiff is a 50% shareholder with Arlene Fleming. Each continues to draw their salaries but the company has suffered losses.
- [114] The losses are the company's and this award is not intended to replace those losses but rather to compensate the plaintiff for his loss of earnings capacity. In my view, the appropriate reward is \$150,000 for the period ending at the trial date.
- [115] The medical reports each say that the plaintiff is not now restricted by his injuries in terms of carrying out any of the administrative tasks associated with his job. There is indication that he will continue to have symptoms and will be restricted from doing the physical aspects of his job that he has done in the past. In my view that does support a finding of a loss of capacity to earn income that extends beyond the time before trial. I fix the future loss of capacity to earn income at \$40,000.

Loss of Housekeeping Capacity

- [116] The Court of Appeal in *O'Connell v. Yung*, 2012 BCCA 57, said as follows at paragraphs 64-67:
- [64] *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, 4 B.C.L.R. (3d) 178 (C.A.), and *McTavish v. MacGillivray*, 2000 BCCA 164, 74 B.C.L.R. (3d) 281, both concerned the loss of housekeeping capacity which, prior to *Kroeker*, had not been accepted in this Province as a separate head of damage.
- [65] As explained by Professor Cooper-Stephenson in *Personal Injury Damages in Canada*, 2d ed. (Scarborough: Carswell, 1996) at 315, the claims for loss of home making capacity and for future cost of care are distinct:

The claim for loss of homemaking capacity is for the loss of the value of work which would have been rendered by the plaintiff, but which because of the injuries cannot now be performed. The plaintiff has lost the ability to work in a manner that would have been valuable to her- or himself as well as to others. The claim is not the same as that under future cost of care, which is for the value of services that must now be rendered to the plaintiff. It is true that the two claims may overlap--just as the normal claim for loss of earnings and cost of care may do so--because the cost of care claim may include items which the plaintiff-homemaker would have performed but for the accident. However, a large portion of homemaking involves the performance of work for others, namely, the family unit, and in many cases the claim for loss of homemaking capacity is wholly distinguishable from that for cost of care, particularly if the plaintiff is hospitalized. The loss is a "negative" loss, in the sense that it is the loss of something the plaintiff would have had (her homemaking work) but which she now does not have because of the accident. This places it squarely under the head of loss of working capacity. In contrast, the expense of services provided by others to care for the plaintiff are "positive" losses--the addition of an extra expense--and they clearly fall under cost of care.

- [66] Indeed, in *McTavish*, the Court distinguished between loss of housekeeping capacity and future care costs, at para. 43:
- [43] As I have noted, the majority in *Kroeker* quite clearly decided that a reasonable award for the loss of the capacity to do housework was appropriate whether that loss occurred before or after trial. It was, in my view, equally clear that it mattered not whether replacement services had been or would be hired. It did not adopt the analogy with future care as a general rule. Nor did it permit, nor in view of the authorities to which I have referred could it have permitted, a deduction for the contingency that replacement services might not be hired. Allowances for contingencies are for risk factors that might make the loss of capacity more or less likely. [Emphasis of Kirkpatrick J. in O'Connell]
- [67] As noted by Madam Justice Huddart in *McTavish*, at para. 16, the case was concerned with the development of principled restraints on claims for loss of housekeeping capacity. One of the principles approved in *Kroeker* came from *Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 at 407, [1991] 6 W.W.R. 408 (Sask. C.A.), in which it was said that it is not necessary for a plaintiff to prove that someone will be employed to do the work in the future to be entitled to an award for loss of housekeeping capacity. As I understand the principle, it is the loss of a capacity - an asset - that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (*Krangle* at para. 22). Determining the amount of a reasonable cost of future care award entails a unique set of considerations, as Professor Cooper-Stephenson explains at 416:

It is clear that both the need and the opportunity for the expenditure of moneys is relevant to the assessment. Therefore, if the plaintiff's medical condition may require care of a less expensive nature--such as institutional care--then the award for future cost of care should reflect that possibility. Equally, it would seem, if the evidence is not conclusive that more expensive care will be available, or that the plaintiff will find such care to be physically and emotionally satisfactory, then the award should reflect those possibilities; the reduced award will then reflect the best estimate of what will be reasonably necessary to provide optimum care. In this sense, the court is bound to look to the actual spending potential of the plaintiff.

- [17] In this case, Dr. Laidlow indicated in 2014 that the plaintiff did not need assistance in doing his housework but that he may have to do it in "more of a piecemeal fashion than before". There is no medical support for the plaintiff's claim of loss of housekeeping capacity. The plaintiff did testify that his back pain makes heavier tasks around the home more difficult. However, that is not, in my view, a sufficient basis upon which to make an award.

Apportionment

- [118] In dealing with this issue, the distinction between the concepts of divisible/indivisible injuries, apportionment, and causation must be considered.
- [119] *Athey v. Leonati*, [1996] 3 S.C.R. 458, is a frequently referenced authority in this area. Within the decision are comments on apportionment between tortious causes and the difference in analysis where injuries result from tortious and non-tortious causes. The Supreme Court of Canada said this at para. 22:
- [22] The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.
- [120] In respect of divisible/indivisible injuries, the Court made these comments at paragraphs 24 and 25:
- [24] The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): *Fleming*, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: *Fleming*, supra, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.
- [25] In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.
- [121] In *Bradley v. Groves*, 2010 BCCA 361, the Court of Appeal confirmed that the effect of the Supreme Court of Canada decision in *Athey* was to change the law of apportionment in respect of indivisible injuries. The Court said this:

- [32] There can be no question that *Athey* requires joint and several liability for indivisible injuries. Once a trial judge has concluded as a fact that an injury is indivisible, then the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them.
- [33] The approach to apportionment in *Long v. Thiessen* is therefore no longer applicable to indivisible injuries. The reason is that *Long v. Thiessen* pre-supposes divisibility: *Long* requires courts to take a single injury and divide it up into constituent causes or points in time, and assess damages twice; once on the day before the second tort, and once at trial. Each defendant is responsible only for their share of the injury and the plaintiff can recover only the appropriate portion from each tortfeasor.
- [34] That approach is logically incompatible with the concept of an indivisible injury. If an injury cannot be divided into distinct parts, then joint liability to the plaintiff cannot be apportioned either. It is clear that tortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the Negligence Act, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant.
- [35] This is not a case of this Court overturning itself, because aspects of *Long v. Thiessen* were necessarily overruled by the Supreme Court of Canada's decisions in *Athey*, *E.D.G.*, and *Blackwater*. Other courts have also come to this same conclusion: see *Misko v. Doe*, 2007 ONCA 660, 286 D.L.R. (4th) 304 at para. 17.
- [36] It may be that this represents an extension of pecuniary liability for consecutive or concurrent tortfeasors who contribute to an indivisible injury. We do not think it can be said that the Supreme Court of Canada was unmindful of that consequence. Moreover, apportionment legislation can potentially remedy injustice to defendants by letting them claim contribution and indemnity as against one another.
- [37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all

litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[122] As noted above in paragraphs 57-82, the medical opinions here say that the plaintiff's low back injury arose in MVI1, that MVI2 caused a temporary aggravation of the symptoms related to this injury, and that the remaining symptoms are entirely attributable to MVI1.

[123] Dr. Pisesky, for the defence, does reference the plaintiff's complaints in respect of his mid back and neck but does not address the cause or consequence of those complaints. Dr. Laidlow, for the plaintiff, says the mid back and neck injuries were caused by MVI1 and MVI2. I conclude that each of these areas of injury are indivisible.

[124] Dr. Laidlow confirms that the knee injury is entirely attributable to MVI3.

[125] There is no evidence that contradicts these medical opinions.

[126] The defendants argue that the nature and intensity of treatment suggests that MVI2 had a more significant effect than either the plaintiff or the medical experts indicate. The defence also points to the severity of MVI2 to say that the forces involved would have been significant and therefore likely to have caused significant injury. Its arguments are summarized in part at paragraphs 35 and 36 of the defence written argument as follows:

35. The plaintiff's back injury has persisted from the first accident to the present. It is submitted that notwithstanding the opinions of Drs. Laidlow and Pisesky, this court can find that the second accident contributed to his back injury including to his lower back. He commenced taking Gabapentin after the second accident; he and his physician requested an MRI after the second accident. He was able to continue cycling after the first accident but his cycling was impeded substantially by the second accident; and the evidence of Ms. Fleming is that the plaintiff was back to work on close to a full-time basis prior to the second accident, but was disabled for working full-time again for a period afterwards. Opinions attributing his lower back injury solely to the first accident are suspect for that reason. The plaintiff also suffered mid-back injury and neck injury which were attributable to both accidents.
36. In analogous cases, courts have held that injuries from a second accident were indivisible from first-accident injuries where the plaintiff had not yet recovered from the first accident and where the first accident injuries were exacerbated and aggravated.

[127] I accept the medical opinions. The treatment regime that the plaintiff undertook was an evolution and it is my conclusion that the persistence of the symptoms from MVI1, together with the aggravation resulting from MVI2, drove the treatment decisions. The severity of an impact is relevant but there is no evidence here, nor is it something I am prepared to accept as a general proposition, that there is a direct correlation between force of impact or speed of impact and resulting injuries. Any inferences that could be drawn certainly do not displace the unanimous expert medical opinions before me.

[128] Each of the neck and mid back injuries are indivisible and were caused by MVI1 and MVI2. The low back and knee injuries are divisible and caused by MVI1 and MVI3, respectively. I find that MVI2 caused a temporary aggravation of the low back symptoms which is irrelevant to divisibility.

Conclusion

[129] In the result, I reject both parties' arguments on apportionment. In the circumstances, including the plaintiff's settlement in respect of MVI2, I require further submissions from counsel as to the application of these findings to the global award that I have made. Counsel should contact trial scheduling to arrange a time for those submissions including their estimate of time needed.

"Betton J."

Appendix "A"

Plaintiff's Authorities Relied On

1. Preston v. Kontzamanis, 2015 BCSC 2219
2. Hutchinson v. Dyck, 2015 BCSC 1039
3. Dzumhur v. Davoody, 2015 BCSC 2316
4. Rowe v. Bobell Express Ltd., 2005 BCCA 141
5. Everett v. King (1981), 34 B.C.L.R. 27 (S.C.)
6. Boaler v. Brar, [1995] B.C.J. No. 2341
7. Wagner v. Narang, 2003 BCSC 1750
8. Gillespie v. Yellow Cab Company Ltd., 2015 BCCA 450
9. Savoie v. Williams, 2013 BCSC 2060

Defendant's Authorities Relied On

1. Amini v. Mondragaon, 2014 BCSC 1590
2. Bilanik v. Ferman, 2014 BCSC 732
3. Sandhu v. Gabri, 2014 BCSC 2283
4. De Vries v. Poltorak, 2013 BCSC 2527
5. Munoz v. Singh, 2014 BCSC 567
6. Athey v. Leonati, [1996] 3 S.C.R. 458
7. Rowe v. Bobell Express Ltd., 2005 BCCA 141

8. Reynolds v. M. Sanghera & Sons Trucking Ltd., 2015 BCCA 232
 9. Engel v. Salyn, [1993] 1 S.C.R. 306
 10. Ridge Tool Company v. A & L Plumbing & Heating Ltd., 2010 SKCA 45
 11. Hutchings v. Dow, 2006 BCSC 629, aff'd 2007 BCCA 148
 12. Bradley v. Groves, 2010 BCCA 361
 13. Ashcroft v. Dhaliwal, 2008 BCCA 352
 14. Blenkarn v. Mills, 2016 BCSC 1976
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